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IN THE

Supreme Court of the United States

BROOKSHIRE BROTHERS HOLDING, INC. ET AL,
PETITIONERS

v.

DAYCO PRODUCTS, INC. ET AL, RESPONDENTS

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This Court's decision in *Carlsbad Technologies, Inc. v. HIF Bio, Inc.*, __ U.S. __, 129 S. Ct. 1862 (May 4, 2009) (No. 07-1437), makes clear the need for this Court to timely reconsider its holding in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976), and to restore the clear bar on appellate review of district court remand orders Congress intended with the plain terms of 28 U.S.C. § 1447(d). This case presents an appropriate vehicle for reconsidering *Thermtron*.

In addition, because this case was removed to federal court solely under 28 U.S.C. §§ 1334(b) and 1452(a), the court of appeals also lacked jurisdiction under Section 1452(b)'s prohibition of review of remand orders in removed bankruptcy-related cases based on "on any equitable ground." That question too warrants this Court's review, especially since Fifth Circuit law exports the confusion and disruption of *Thermtron*'s mistaken rationale into the bankruptcy context under Section 1452(b). *See* Part II.B, *infra*. At the very least, the Court should grant the petition, vacate the decision below, and remand to permit the court of appeals to consider its lack of jurisdiction under Section 1452(b).[1]

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[1] As respondents noted (Opp. 3 n.1), defendants Dayco and Mark IV have petitioned for bankruptcy since the filing of the petition for certiorari in this case. The remaining, non-bankruptcy defendants filed their brief in opposition without Dayco and Mark IV. *Id.* The bankruptcy filing of the non-responding defendants does not affect this Court's ability to act on the petition. *See* 3 *Collier on Bankruptcy* § 362.03[3][d] (15th ed. 2002) ("[A] suit against a codefendant is not automatically stayed by the debtor's bankruptcy filing."); *accord Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir.

I. THE COURT SHOULD GRANT REVIEW AND RECONSIDER ITS PRIOR DECISION IN *THERMTRON*

This Court in *Carlsbad Technologies* held that a district court's decision in a removed case to remand after declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) does not constitute a remand for lack of subject matter jurisdiction under 28 U.S.C. § 1447(c), and therefore does not fall within the bar on appellate review under 28 U.S.C. § 1447(d). The Court made clear that its holding was compelled by the logic of its prior decision in *Thermtron*, 423 U.S. at 345-46. *See* 129 S. Ct. at 1865-66 & n.1.

The Court noted that, although the holding in *Thermtron* was inconsistent with the plain terms of Section 1447(d), it had no occasion in *Calrsbad Technologies* to "revisit . . . whether *Thermtron* was correctly decided," because "[n]either the brief for petitioner nor the brief for respondents explicitly asked the Court to do so . . ., and counsel for both parties clearly stated at oral argument that they were not asking for *Thermtron* to be overruled." *Id.* at 1866 n.*. The Court further noted that no party in any of its post-*Thermtron* cases has ever asked that *Thermtron* be reconsidered. *Id.* ("We also note that the parties in *Powerex*, *Quackenbush*, and *Things Remembered* did not ask for *Thermtron* to be overruled."). Similarly, Justice Scalia's concurring opinion in *Carlsbad Technologies* emphasized that "nei-

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1983). Nonetheless, in an abundance of caution, respondents are contemporaneously moving in the bankruptcy court to modify the automatic stay to expressly exempt the proceedings in this Court.

ther party [in *Carlsbad Technologies*] has asked us to reconsider *Thermtron*, and we thus have no occasion to revisit that decision here." *Id.* at 1868. Justice Scalia went on to explain that "*Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case." *Id.*; *see also id.* at 1869 (Breyer, J., concurring) (noting that decisions following *Thermtron* show "something is wrong" and suggesting that "experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate").

The time has come for this Court to overrule *Thermtron*. The text of 28 U.S.C. § 1447(d) is clear: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." By its terms, it applies to *all* remand orders, and it reflects Congress's considered judgment that appeals of remand orders waste judicial resources, needlessly delay the legal process, and exacerbate the interference with state judicial proceedings necessarily occasioned by removal. The sole exception to the appellate-review bar of Section 1447(d) is limited to certain civil rights cases removed under 28 U.S.C. § 1443, and is not implicated here. As then-Justice Rehnquist explained in his dissent in *Thermtron*, Section 1447(d) "means what it says." 423 U.S. at 354 (Rehnquist, J., dissenting). And "Congress' purpose in barring review of all remand orders has always been very clear—to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand." *Id.*

The rationale of *Thermtron* has corrupted this area of the law and has resulted in "a hodgepodge of jurisdictional rules that have no evident basis even

in common sense." *Carlsbad Technologies*, 129 S. Ct. at 1868 (Scalia, J., concurring). Such confusion was predicted by then-Justice Rehnquist in *Thermtron* itself. *See* 423 U.S. at 356 (Rehnquist, J., dissenting) ("Nor is it any more than a naive hope to suppose, as the Court apparently does, that the effect of today's decision will be limited to the unique circumstances of this case."). Further delay in revisiting *Thermtron* will not bring any greater clarity, and will instead only cause more waste and disruption to litigants and courts. It is time to restore the clarity reflected in the plain terms of Section 1447(d), overrule *Thermtron*, and hold that Section 1447(d) bars appellate review of all district court remand orders.

The court of appeals' decision in this case relied squarely on this Court's rationale in *Thermtron* in holding that it has jurisdiction over the appeal of the remand order in this case. *See* Pet. App. 3a-5a. This case is therefore an appropriate one in which to reconsider *Thermtron*.

II. SECTION 1452(b) FURTHER SUPPORTS GRANTING THE PETITION

The court of appeals also lacked appellate jurisdiction to review the district court's remand order because this case was removed to federal court under 28 U.S.C. § 1452(a) solely because it was related to a bankruptcy proceeding. Section 1452(b) makes clear that the district court may remand such a case on "any equitable ground," and that any such remand order "is not reviewable by appeal or otherwise." 28 U.S.C. § 1452(b).

Respondents concede (Opp. 4) that this case was removed under Section 1452(a) solely because it was "related to" a bankruptcy proceeding under 28

U.S.C. § 1334(b). Their arguments that Section 1452(b) nonetheless does not bar appeal of the remand order are unpersuasive and do not obviate the need for this Court's review.

A. The Factors Relied Upon By The District Court Constitute "Equitable Ground[s]" Under Section 1452(b)

Respondents assert (Opp. 16) that the district court's reliance on the discretionary supplemental-jurisdiction factors of 28 U.S.C. § 1367(c) removes this case from the coverage of Section 1452(b) because the Section 1367(c) factors are not entirely identical to the equitable factors lower courts have identified in remanding cases under Section 1452(b). That argument is unavailing.

Respondents ignore entirely the factors courts have developed under Section 1452(b) that are similar to the factors identified in Section 1367(c). *See* Pet. 4 (identifying such "equitable" factors as "the extent to which state law issues predominate over bankruptcy issues"; "the difficulty or unsettled nature of the applicable state law"; "the jurisdictional basis, if any, other than [§ 1334"; and "the presence of a related proceeding commenced in state court") (citing *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 801-02 (M.D. La. 2001)). The actual factors the district relied on in this case, moreover, correlate closely to equitable factors courts have identified under Section 1452(b). *See* Pet. App. 16a (district court remand order noting the "complex issues of State law" presented by the underlying product liability claims; the lack of any federal claim or any connection to the bankruptcy proceedings; the fact that "the suit . . . contains only issues of State law"; and "the interest of comity" as grounds for remand).

Moreover, the relevant question is not the exact overlap of the factors, but whether the district court remanded "on any equitable ground." Here, the factors the district court actually relied upon are all properly characterized as "equitable ground[s]." Indeed, respondents do not contest that the factors relied upon by the district court are all permissible "equitable" factors on which district courts can remand a case under Section 1452(b).

As Justice Ginsburg explained in her concurring opinion in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 132 (1995), Section 1452(b)'s reference to remands on "any equitable ground" are "capacious words" that are not limited to the traditional distinctions between law and equity, but instead include *all appropriate grounds*. Several courts of appeals have relied upon Justice Ginsburg's formulation to hold a broad range of grounds are "equitable" and therefore non-appealable under Section 1452. *See* Pet. 15-16 (collecting cases). Indeed, if the failure to timely remove is an equitable ground under Section 1452(b), as Justice Ginsburg concluded in *Things Remembered*, it necessarily follows that the discretionary factors under Section 1367(c) relied upon by the district court here are equitable grounds. Respondents do nothing to rebut this conclusion.[2]

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[2] Respondents emphasize (Opp. 15) that the district court did not mention Section 1452 in its remand order and instead expressly relied on Section 1367(c). But, again as explained by Justice Ginsburg in her concurring opinion in *Things Remembered*, "it 'make[s] little sense' to rest reviewability *vel non* on the tag the trial court elects to place on its ruling." 516 U.S. at 134, quoting *Sykes v. Texas Air Corp.* 834 F.2d 488, 492 (5th Cir. 1987). Accordingly, regardless of how the district court characterizes the basis for its remand order, appellate review is

B. Section 1452(b) Applies To All Remands Of Cases Removed Under Section 1452(a), Even If The Case Has Lost Its Relationship To Bankruptcy

Respondents, relying on the Fifth Circuit's decision in *Doddy v. Oxy USA, Inc.*, 101 F.3d 448 (5th Cir. 1996), argue that "where, as here, a case is removed under § 1452(a) and the bankruptcy-related claims are later dismissed, . . . 'the court's remand authority switches from that under § 1452 to that under § 1367.'" Opp. 17 (quoting *Doddy*, 101 F.3d at 455). That reading of Section 1452 makes no sense.

The relevant grant of federal court jurisdiction is contained in 28 U.S.C. § 1334. It grants district courts original but not exclusive jurisdiction over "*all civil proceedings* . . . arising in or *related to* cases under title 11." 28 U.S.C. § 1334(b) (emphasis added). Section 1452(a) permits a party to "remove *any claim or cause of action* . . . if [the] district court *has jurisdiction of such claim or cause of action* under section 1334." 28 U.S.C. § 1452(a) (emphasis added). Section 1452(b) then provides that "[t]he court to which *such claim or cause of action is removed* may remand *such claim or cause of action* on any equitable ground." 28 U.S.C. § 1452(b) (emphases added).

Under a plain reading of those provisions, *all* of the claims in this case were within the district court's jurisdiction under § 1334 at the time of removal, because they were part of a "*civil proceeding . . . related to*" TCI's bankruptcy case. *See Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d

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barred by Section 1452(b) whenever the district court remands a case removed under Section 1452(a) on any equitable ground.

263, 267 (3d Cir. 2002) (noting that even if district court had jurisdiction under 28 U.S.C. § 1331 or some other jurisdictional provision, it had jurisdiction over entire case under Section 1334(b), including "Title 11 claims" and "state law claims because they were related to a Title 11 claim"). Because all of the claims were removed under § 1452(a), they were all subject to remand under § 1452(b), even though post-removal events eliminated the remaining claims' relationship to the bankruptcy proceedings. That is true, moreover, even if the district courts would also have jurisdiction over those claims under the supplemental jurisdiction provisions of Section 1367 or under some other jurisdictional provision. Under the plain terms of § 1452, any claim removed under § 1452(a) may be remanded under § 1452(b) for "any equitable ground." That is precisely what happened here.

It makes no sense, and undermines Section 1334(b), to divide up claims removed to federal court under Section 1452(a) into "bankruptcy-related" claims and "supplemental jurisdiction" claims, each with different standards for remand and different jurisdictional rules for appeals. Under the reasoning of *Doddy*, non-bankruptcy related claims that are removed along with bankruptcy-related claims are governed by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Even if a district court decided to remand the bankruptcy-related claims to state court "on any equitable ground" under Section 1452(b), Section 1367(c)'s discretionary factors would govern the district court's discretion to remand the supplemental claims, and its decision as to those claims would be subject to appeal under *Carlsbad Technologies*. *See Doddy*, 101 F.3d at 455.

That is a gross distortion of Congress's clear intent—reflected in the plain terms of Section 1452(b)—to grant district court's broad discretion to order remands, and to bar appellate review of such orders, in all cases removed from state court because of their relatedness to a bankruptcy proceeding. The confusion and disruption caused by this Court's *Thermtron* holding should not be permitted to infect the clear terms of Section 1452(b) in remands in bankruptcy-related cases. Yet, that is precisely what will happen under the Fifth Circuit's reasoning in *Doddy*.

That reasoning, moreover, conflicts with that of the Third Circuit's in *Allied Signal*, which rejected a similar argument that the presence of alternative jurisdictional grounds somehow limited the ability to remand cases under Section 1452(b). The Third Circuit held that "[b]ecause this is a bankruptcy case, the additional presence of concurrent § 1331 jurisdiction could not preclude our consideration of remand as it presents itself in a bankruptcy case. The need to avoid the time and expense of reviewing remands in bankruptcy cases is substantial." 298 F.3d at 267 n.4 (citing *Things Remembered*, 516 U.S. at 136 (Ginsburg, J., concurring)). Indeed, the language of Justice Ginsburg's concurring opinion in *Things Remembered* relied on by the Third Circuit is equally applicable here. "Congress . . . meant to enlarge, not rein in, federal trial court removal/remand authority for claims related to bankruptcy cases," and it "wanted bankruptcy forum remands to be 'unreviewable.'" 516 U.S. at 132 (Ginsburg, J., concurring, quoting H.R. Rep. No. 95-595, p. 51 (1977), U.S. Code Cong. & Adm. News 1978, pp. 5787, 6013.

Accordingly, the plain meaning of § 1452(b) confirms the lack of appellate jurisdiction, as does the reasoning of other courts of appeals. *See, e.g., Allied Signal*, 298 F.3d at 269 (holding that the remand of a bankruptcy-related case "based on state law concerns," while not meeting "the criteria for remand under § 1447(c) and for the non-reviewability provisions of § 1447(d)," nonetheless "falls under § 1452(b) . . . and is not reviewable").

C. The Court Should Grant Review, Or At A Minimum, Vacate And Remand To Permit The Court Of Appeals To Consider Section 1452(b)'s Bar On Its Jurisdiction

As petitioners explained in the petition (Pet. 19-20), they did not raise Section 1452(b)'s bar on appellate jurisdiction in the court of appeals, although they did assert it as an independent basis for remand before the district court. Because it is jurisdictional in nature, however, the argument is not waived. *Id.* Contrary to respondents' suggestion (Opp. 13-14 & n.5), the fact that the lack of jurisdiction relates to the court of appeals and not the district court does not alter the jurisdictional nature of the defect or otherwise make it waivable. Appellate courts, like all others, must assure themselves of their jurisdiction, and can raise jurisdictional questions *sua sponte*, whether or not raised below. *See, e.g., Roell v. Withrow*, 538 U.S. 580, 598 (2003) (because valid consent to permit magistrate judge order is prerequisite to appellate jurisdiction, courts of appeals may raise it *sua sponte*).

Moreover, respondents' reliance on *Doddy* undermines their argument that the failure to raise the argument below precludes this Court's review. If, as they assert, Fifth Circuit law is clear that Section

1452(b) remand authority somehow disappeared once the bankruptcy-relatedness of the claims ended, then it would have been futile to raise the argument below, and this Court is free to review the Fifth Circuit's settled law that conflicts with the plain terms of Sections 1334 and 1452, as well as the reasoning of the Third Circuit in *Allied Signal*.

If, however, the Fifth Circuit law is less than clear, as suggested by its failure to follow *Doddy* (*see* Pet. 18 n.7), then it would be appropriate for this Court to grant the petition, vacate the decision below, and remand the case either with instructions to dismiss the appeal under Section 1452(b) or to permit the court of appeals to consider its lack of jurisdiction under Section 1452(b) in the first instance.

In all events, the petition should be granted and the court of appeals' lack of jurisdiction under Section 1452(b) should be resolved. Such review is essential to vindicate Congress's manifest intent, embodied in § 1452(b), to permit removed bankruptcy-related cases to proceed as quickly as possible in State court once a district court orders remand "on any equitable ground."

CONCLUSION

For the reasons explained in the petition and above, the petition for a writ of certiorari should be granted. In the alternative, the case should be remanded with instructions to dismiss the appeal for lack of jurisdiction, or to permit the court of appeals in the first instance to consider its jurisdictional defect under 28 U.S.C. § 1452(b).

Respectfully submitted,

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